

## § 436.37

from funds appropriated or otherwise made available to the agency for the payment of energy expenses and related operation and maintenance expenses which would have been incurred without an energy savings performance contract. The amount the agency would have paid is equal to:

(1) The energy baseline under the energy savings performance contract (adjusted if appropriate under § 436.37), multiplied by the unit energy cost; and

(2) Any related operations and maintenance cost prior to implementation of energy conservation measures, adjusted for increases in labor and material price indices.

(b) Federal agencies may incur obligations pursuant to energy savings performance contracts to finance energy conservation measures provided guaranteed energy cost savings exceed the contractor's debt service requirements.

## § 436.37 Annual energy audits.

(a) After contractor implementation of energy conservation measures and annually thereafter during the contract term, an annual energy audit shall be conducted by the Federal agency or the contractor as determined by the contract. The annual energy audit shall verify the achievement of annual energy cost savings performance guarantees provided by the contractor.

(b) The energy baseline is subject to adjustment due to changes beyond the contractor's control, such as—

- (1) Physical changes to building;
- (2) Hours of use or occupancy;
- (3) Area of conditioned space;
- (4) Addition or removal of energy consuming equipment or systems;
- (5) Energy consuming equipment operating conditions;
- (6) Weather (i.e., cooling and heating degree days); and
- (7) Utility rates.

(c) In the solicitation or in the contract, Federal agencies shall specify requirements for annual energy audits, the energy baseline, and baseline adjustment procedures.

## § 436.38 Terminating contracts.

(a) Except as otherwise provided by this subpart, termination of energy savings performance contracts shall be subject to the termination procedures

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of the Federal Acquisition Regulation in 48 CFR part 49.

(b) In the event an energy savings performance contract is terminated for the convenience of a Federal agency, the termination liability of the Federal agency shall not exceed the cancellation ceiling set forth in the contract, for the year in which the contract is terminated.

## Subpart C—Agency Procurement of Energy Efficient Products

SOURCE: 74 FR 10835, Mar. 13, 2009, unless otherwise noted.

## § 436.40 Purpose and scope.

This subpart provides guidance to promote the procurement of energy efficient products by Federal agencies and promote procurement practices which facilitate the procurement of energy efficient products, consistent with the requirements in section 553 of the National Energy Conservation Policy Act. (42 U.S.C. 8259b)

## § 436.41 Definitions.

*Agency* means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

- (1) The Congress, and agencies thereof;
- (2) The courts of the United States;
- (3) The governments of the territories or possessions of the United States; or
- (4) The government of the District of Columbia.

*Covered product* means a product that is of a category for which an ENERGY STAR qualification or FEMP designation is established.

*ENERGY STAR qualified product* means a product that is rated for energy efficiency under an ENERGY STAR program established by section 324A of the Energy Policy and Conservation Act (42 U.S.C. 6294a).

*FEMP designated product* means a product that is designated under the Federal Energy Management Program as being among the highest 25 percent of equivalent products for energy efficiency.